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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

JOHNSON & SON ERECTORS COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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Questions Presented.

With the advent of the new jurisdiction conferred by Congress on the new United States Claims Court under the Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25 (to be codified in scattered sections of 28 U.S.C.) and Boards of Contract Appeals under the Contract Disputes Act, Public Law 95-563, 41 U.S.C. 601-613:

1. Do the Armed Services Board of Contract Appeals and/or the Claims Court have jurisdiction over the breach of contract claims of petitioner under the Contract Disputes Act or do they have jurisdiction only over constructive changes (a legal fiction unique to the law of government contracts) created to circumvent the decision of the United States Supreme Court in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1965)?

2. After jurisdiction was acknowledged under the Contract Disputes Act, was it error for the United States Court of Claims and the Armed Services Board of Contract Appeals to rule that breach of contract claims had merged into constructive changes claims?

3. Should the legal fiction of constructive changes in government contracts now be abolished in the United States Claims Court and Boards of Contract Appeals?

4. After acknowledging jurisdiction under the Contract Disputes Act, does the Armed Services Board of Contract Appeals have the jurisdictional authority to order breach of contract claims be stricken from the complaint (thereby denying a hearing and decision) without dismissing the breach of contract claims with prejudice?

5. Does an appellant have the right to reelect to appeal de novo, directly to the United States Claims Court under

the Contract Disputes Act, where the Armed Services Board of Contract Appeals orders breach of contract claims stricken from the complaint (thereby denying a hearing and decision)?

6. Is the ruling lawful by the United States Attorney General that the subpoena authority granted by Congress to Boards of Contract Appeals under the Contract Disputes Act may be exercised only in cases within the purview of that Act, and if so, is their subpoena power limited to breach of contract claims alone?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner prays that a Writ of Certiorari be issued to review the decision of the United States Court of Claims in this case Number 435-81C which was entered on June 18, 1982.

Opinions Below.

The opinion of the Court of Claims entered on June 18, 1982 (Appendix A) will be reported in the Court of Claims report by number presently unassigned. Three opinions by the Armed Services Board of Contract Appeals are reported as follows:

1. Opinion on Motion for Reconsideration, March 31, 1981 (Appendix B) is reported at ASBCA 74,598, 81-1 BCA 15,081.

2. Opinion on Government Motion to Dismiss, December 30, 1980 (Appendix C) is reported at ASBCA 73,580, 81-1 BCA 14,879.

3. Opinion on Government Motion to Dismiss, June 30, 1980 (Appendix D) is reported at ASBCA 71,693, 80-2 BCA 14,544.

Jurisdiction.

The opinion of the United States Court of Claims was entered on June 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

Statutory and Contractual Provisions Involved.

The Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25, specifically 28 U.S.C. 1491(a)(2); Contract Disputes Act, Public Law 95-563, 41 U.S.C. 601-613, and the Changes clause which appears in the instant Contract Number F35610-76-C-0010, to wit:

"CHANGES (1968 FEB)

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) in the specifications (including drawings and designs);

(ii) in the method or manner of performance of the work;

(iii) in the Government-furnished facilities, equipment, materials, services, or site; or

(iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation or determination)

from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, *provided* that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however,* That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: *And provided further,* That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change notice under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

Statement.

In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 404-406 (1965), this Court held that the jurisdiction of Boards of Contract Appeals was limited to claims under specific contract provisions authorizing relief and did not extend to breach of contract claims. Effective March 1, 1979, Congress granted to Boards of Contract Appeals the identical jurisdiction of the United States Court of Claims (including, therefore, breach of contract jurisdiction) by means of the Contract Disputes Act, Public Law 95-563, 41 U.S.C. 601-613. In addition, Congress granted the Contractor an election to appeal a contract dispute either to a Board of Contract Appeals or directly to the United States Court of Claims. By the Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25 (to be codified in scattered sections of 28 U.S.C.), Congress divided the jurisdiction of the United States Court of Claims into the United States Court of Appeals for the Federal Circuit and the United States Claims Court, which was expressly granted jurisdiction of Contract Dispute Act claims and disputes, 28 U.S.C. 1491(a)(2).

As this Court itself recognized in *United States v. Utah Construction & Mining Co.*, *supra* at 413-418, ". . . government procurement agencies started several years ago adding various contract clauses designed to convert what would otherwise be claims for damages for breach of contract into claims payable under such contract clauses and, hence, to be regarded as 'arising under the contract' ", *supra* at 418. Specifically, this Court mentioned the Suspension of Work

clause adopted in response to *United States v. Rice*, 317 U.S. 61.

Not satisfied with fashioning additional contract adjustment clauses to resolve disputes, Boards of Contract Appeals, with the blessing of the United States Court of Claims, have created an extensive new body of contract law, unique to government contracts, under the legal fiction of constructive changes, in response to *United States v. Utah Construction & Mining Co., supra*. Constructive changes are not claims "arising out of the contract." Instead, constructive changes arise out of a fiction that the Contracting Officer either knew or should have known of the claim, and therefore, constructively ratified the change by a subsequent contract amendment pursuant to the Changes clause. Thereby, the Changes clause has been completely rewritten judicially by the decisions of the United States Court of Claims and Boards of Contract Appeals.

Since 1967, the Changes clause in construction contracts, DAR 7-602.3, incorporated into the instant Contract F35610-76-C-0010, has provided:

> "CHANGES (1968 FEB)
>
> (a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:
>
> (i) in the specifications (including drawings and designs);
>
> (ii) in the method or manner of performance of the work;
>
> (iii) in the Government-furnished facilities, equipment, materials, services, or site; or
>
> (iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, *provided* that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder."

Today, any government contractor reading the Changes clause literally, would absolutely be deceived. The contractor would read that only the "Contracting Officer" could make a change in the contract by "written order designated or intended to be a change order" (subparagraph (a) of the Changes clause) or by a "written notice" (subparagraph (b) of the Changes clause). Not so. Any government representative (not just the Contracting Officer) may make a change in a government contract by written or oral action or inaction. While the decisions are legion, a learned review of the constructive changes decisions of the Armed Services Board of Contract Appeals and the United States Court of Claims is set forth at pages 4-13 of the decision by the Honorable Basil S. Norris, Administrative Judge (Appendix B). Parenthetically, constructive changes are one of the primary causes of massive cost overruns on government contracts because constructive changes are made without budgets, procurement authority, or contract documentation specifying the precise scope of work required by the government.

In light of the breach of contract jurisdiction granted by Congress to Boards of Contract Appeals under the Contract Disputes Act, petitioner earnestly urges:

1. That the legal fiction of constructive changes has served its usefulness in response to *United States v. Utah Construction & Mining Co., supra*, and therefore, should be abolished in both the United States Claims Court and Boards of Contract Appeals, and along with it, the legal fiction of the merger of breach of contract claims into constructive changes.

2. That the decisions of the Armed Services Board of Contract Appeals (Appendices B and C), affirmed by the United States Court of Claims (Appendix A), that breach of contract claims under the Contract Disputes Act are merged into constructive changes claims, were in error.

3. That an appellant in a contract dispute has the right to reelect to appeal de novo, directly to the United States Claims Court under the Contract Disputes Act, where the Armed Services Board of Contract Appeals orders breach of contract claims stricken from the complaint (thereby denying a hearing and decision).

Petitioner concedes that there is only one claim arising out of the same set of facts, but urges that petitioner be granted its election to appeal under the Contract Disputes Act with its breach of contract claims, whereby the constructive changes claims would be dismissed with prejudice. Cf. *Edward R. Marden Corporation v. United States*, 194 Ct. Cl. 799, 442 F.2d 364 (1971). Thereby, the Armed Services Board of Contract Appeals should have jurisdiction under the Contract Disputes Act over all claims for breach of contract, including defective specifications, superior knowledge, impossibility of performance and reformation, not merely delay and disruption.

In the instant Contract F35610-76-C-0010, there is a conflict and/or ambiguity between ¶ 2, § 15 and ¶ 3.4, § 15 of the specifications in that ¶ 2, § 15 requires that "each item of equipment shall be of the most recent type which has been proved in *successful commercial operation for at least three (3) years* without major changes in design" (emphasis added). In addition, the Government required at ¶ 2, § 15, that "the contractor may be required to submit evidence, subject to verification by the Contracting Officer, of satisfactory similar installations as proof of compliance with this requirement." The Comprehensive Summary of Baghouse Installations on Industrial and Utility Boilers published in January 1977 and the NTIS, Department of Commerce Report PB-245 186, "Applying Fabric Filtration to Coal Fired Industrial Boilers. A Pilot Scale Investigation," for EPA dated August 1975, evidence (uncontested by the Government) that there were no configurations specified at ¶ 3.14, § 15 (*i.e.* "bag material for pulse jet cleaning mode shall be teflon felt bag") in commercial operation at least three (3) years before the award of the contract on August 29, 1975. Thus the contract specifications were defective resulting in practical impossibility of performance. The Government engineers and their engineer contract consultants, Weiland, Lingren & Associates, Seattle, Washington, had superior knowledge over the contractor who bid a fixed price formal advertised *construction* contract that did not provide for any research or development whatsoever. The contractor, a sole proprietorship, Johnson & Son Erectors Company, is exactly what its name implies, erectors. It never was an engineering company; it was a construction company. Today, Barney T. Johnson, the sole proprietor suffers under IRS tax liens and garnishments, as well as surety claims, whereby his $229,284 claim, if recovered, will not make him whole.

The remedies most adequate to petitioner are breach of warranty and reformation, not the legal fiction of constructive changes. If denied the subpoena power granted by Congress to Boards of Contract Appeals under the Contract Disputes Act, 41 U.S.C. 610, the ability of petitioner to marshal evidence to comply with the ruling of this Court in *United States v. Corlo Bianchi & Co.*, 373 U.S. 709 will be seriously impaired. This is an enormous nationwide case for a $229,284 claim. The evidence to prove that there was no "successful commercial operation" of a pulse jet teflon felt baghouse three years before contract award on August 29, 1975, will require testimony and production of documents from DuPont in Wilmington, Delaware (manufacturer of teflon felt), Standard Havens in Kansas City, Kansas (manufacturer of the baghouse and bags), Environmental Testing Services Inc., in Alexandria, Virginia (EPA research consultant on baghouses), Weiland, Lingren & Associates, Seattle, Washington (Government engineering consultants who wrote the specifications), Alestra Masonary, Sacramento, California (who installed the foundation) and Headquarters 827th Air Defense Group (ADCOM) Kingsley Field, Oregon. DuPont and Standard Havens have already taken the position (in response to requests for voluntary discovery), that they will oppose discovery per se by motion to quash in their respective United States District Courts. If petitioner could secure the nationwide subpoena power of the Contract Disputes Act, then trial could be centralized, and any motion to quash discovery could be heard before the Armed Services Board of Contract Appeals itself in a consolidated hearing in California.

Both the United States Court of Claims and the Armed Services Board of Contract Appeals have relegated discovery to the issuance of subpoenas through United States Attorneys by various United States District Courts under 5

U.S.C. 304. It is petitioner who must engage local counsel to support the issuance of the subpoenas and the defense against motions to quash (known to be forthcoming at least from DuPont and Standard Havens). Thereby only discovery may be obtained. After discovery, there would have to be hearings in Wilmington, Delaware; Washington, D.C.; Kansas City, Kansas; Sacramento, California and Kingsley Field, Oregon. Discovery and trial could well consume the $229,284 claim so as to cause petitioner to go to trial with inadequate evidence or abandon his claim.

The Armed Services Board of Contract Appeals has decided that it has subpoena power only on the breach of contract claims incident to delay and disruption (page 14 of Appendix B) predicated upon a ruling by the United States Attorney Gerneral that the subpoena authority by Congress to Boards of Contract Appeals under the Contract Disputes Act may be exercised only in cases within the purview of that Act. The Armed Services Board of Contract Appeals has placed the burden on petitioner to demonstrate that any request for Armed Services Board of Contract Appeals nationwide subpoena power relates directly to the breach of contract claims incident to delay and disruption. Petitioner respectfully urges that the ruling by the United States Attorney General is erroneous per se, that Congress granted subpoena power to the Boards of Contract Appeals under the Contract Disputes Act without limitation, and that if jurisdiction exists under the Contract Disputes Act, it exists for adjudication of all claims appealed to Boards of Contract Appeals.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully submits that this Court may not be presented with a case so properly framed to review its decisions in *Utah* and *Bianchi* in light of the new jurisdiction of Boards of Contract Appeals and the new United States Claims Court under the Contract Disputes Act and the Federal Courts Improvement Act. The decisions of the United States Court of Claims and the Armed Services Board of Contract Appeals (Appendices A through D) evidence the intent to perpetuate the legal fiction of constructive changes in spite of the breach of contract jurisdiction granted by Congress under the Contracts Disputes Act. Obviously, the landmark decision in *United States v. Utah Construction & Mining Co.* is no longer law. The question is the extent to which the *United States v. Carlo Bianchi & Co.* decision is still law in light of the new jurisdiction conferred by Congress on the Boards of Contract Appeals, the United States Claims Court and the United States Court of Appeals for the Federal Circuit.

Prayer.

For reasons aforesaid, Petitioner earnestly prays that the instant Petition for a Writ of Certiorari be granted.

Dated: September 14, 1982.

Respectfully submitted,

DEAN FRANCIS PACE,

Attorney for Petitioner.